Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
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1998 Biennial Regulatory Review — Spectrum) WT Docket No. 98-205
Aggregation Limits for Wireless Telecommuni-)
cations Carriers)

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OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF BELLSOUTH CORPORATION

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SUMMARY

The 45 MHz CMRS spectrum cap should be eliminated because the development of meaningful competition and lower prices have satisfied the cap's purpose and justify its elimination under Section 11 of the Communications Act. Currently, there are three or more competing broadband CMRS providers in markets covering 87 percent of the nation's population, and more than two-thirds of the population now has a choice between four to six broadband CMRS providers. Even in rural and high cost areas, there are at least two licensed cellular providers. Thus, at least 90 percent of the nation's territory and 98 percent of its population now has access to at least two, and in some markets up to six, competing CMRS providers. As a result, meaningful competition has arrived and prices have fallen, thus fully satisfying the rule's purpose and justifying its elimination under Section 11.

Moreover, eliminating the 45 MHz cap will serve the public interest, even in rural areas. By eliminating the cap, carriers will be able to take full advantage of technical innovations, consumer demand, and spectrum efficiencies, enabling them to better compete with LECs and narrowband-type services, resulting in greater overall telecommunications competition. Carriers will also have the incentive to develop and deploy new advanced technologies and services, including third generation/IMT-2000 services now expected to require a total of 390 MHz of spectrum. By eliminating the spectrum cap in rural areas, the Commission will enable existing carriers to take advantage of greater economies of scale, resulting in lower prices to consumers, and will incent other carriers (who may currently be prohibited by the cap) to offer service in such areas as well. Rural carriers will also be able to use spectrum otherwise lying fallow to offer the advanced services increasingly demanded by consumers.

Existing antitrust laws, transfer and assignment review polices, and complaint procedures are all available to police against possible anticompetitive conduct in the absence of a cap. The competitive marketplace also serves to police against anticompetitive conduct. If, however, the Commission is not ready to rely solely upon those forces, the solution is to sunset the spectrum cap. At the outset, BellSouth believes that a two-year sunset is most consistent with the biennial review process established by Section 11. Alternatively, the Commission could set the sunset date at five years from the Commission's issuance of the D, E, and F Block broadband PCS licenses, to coincide with the initial five-year build-out requirements.

Given the option to eliminate the cap, temporary forbearance from enforcement, while leaving the rule on the books, is a poorly-tailored remedy. Not only does forbearance not address the fact that the increasing need for access to spectrum created by new subscribers is not temporary, it also does not give carriers the regulatory certainty they need in deciding whether to invest in new technologies and services. If the cap is not warranted, it should be eliminated. At the very least, however, the Commission must increase the amount of spectrum that can be aggregated under the cap to meet carriers' growing spectrum needs. While early estimates have predicted a terrestrial commercial wireless spectrum requirement of 390 MHz by 2010, there is ultimately no way of knowing how much spectrum carriers will need as the industry evolves. Accordingly, elimination of the cap is the preferred alternative.

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1998 Biennial Regulatory Review — Spectrum Aggregation Limits for Wireless Telecommunications Carriers	)	WT Docket No. 98-205

To: The Commission

COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby submits these comments in response to the Commission's *Notice of Proposed Rulemaking*, WT Docket No. 98-205, FCC 98-308 (rel. Dec. 10, 1998), *summarized*, 63 Fed. Reg. 70727 (Dec. 22, 1998) (*Notice*). The Commission seeks comment on whether to repeal, modify, retain, or forbear from enforcing the 45 MHz Commercial Mobile Radio Services ("CMRS") spectrum cap, set forth in Section 20.6 of the Commission's rules,[1] as part of the biennial review of its regulations. As shown herein, because the spectrum cap is "no longer necessary in the public interest as the result of meaningful competition" between CMRS providers, the Commission should immediately eliminate Section 20.6 in accordance with Section 11 of the Communications Act.[2]

INTRODUCTION

At the time the CMRS spectrum cap was first adopted in 1994, most areas of the United States received mobile telephone service only from two cellular providers, while potential competitors — broadband personal communications services ("PCS") and specialized mobile radio

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1 47 C.F.R. § 20.6.

2 *See* 47 U.S.C. § 161.

("SMR") — were either in their infancy or not yet fully evolved. As the Commission prepared to begin auctioning new PCS licensees, it was concerned that licensees, acting alone or in combination, could aggregate sufficient amounts of spectrum to exclude new competitors, thereby reducing service options or increasing prices to the detriment of consumers.[3] The Commission believed that a cap on the amount of spectrum that a single entity could control in any one geographic area would prevent that entity from artificially increasing prices.[4] Accordingly, the Commission adopted the CMRS spectrum cap in its *CMRS Third Report and Order* as a restriction on the amount of spectrum certain CMRS licensees could aggregate in a given area.

The Commission imposed the spectrum cap only upon cellular, broadband PCS, and SMR, finding these three CMRS radio services to have the most spectrum and hence the greatest potential to limit entry by other providers.[5] The Commission stated that other CMRS providers had insufficient spectrum to exert market power over CMRS as a whole.[6] Pursuant to the cap, a single entity and its affiliates can acquire no more than 45 MHz of combined attributable cellular, PCS, and SMR spectrum within a given PCS licensing area.[7] While the Commission subsequently eliminated other service-specific caps, it has steadfastly maintained the 45 MHz CMRS cap "to avoid excessive concentration of licenses and to promote and preserve competition in the CMRS marketplace."[8] The

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3 *See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 8104 (1994) (*CMRS Third Report and Order*).

4 *See CMRS Third Report and Order*, 9 F.C.C.R. at 8104.

5 *See CMRS Third Report and Order*, 9 F.C.C.R. at 8108.

6 *See CMRS Third Report and Order*, 9 F.C.C.R. at 8108.

7 *See* 47 C.F.R. § 20.6.

8 *See Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the CMRS Spectrum Cap*, WT Docket No. 96-59, *Report and*

Commission has stated, however, that as more spectrum of a flexible nature is auctioned, such as spectrum for third generation services, its concerns regarding concentration in the CMRS marketplace "could significantly diminish."[9]

From its inception, then, the Commission has stated that the purpose of the spectrum cap was to "ensur[e] that multiple service providers would be able to obtain spectrum in each market," thus "facilitat[ing] development of competitive markets for wireless services."[10] As shown below, the current presence of multiple competing CMRS providers in each market, and the promise of more to come, as well as the competitive nature of the CMRS marketplace as a whole, demonstrate that the time is now to eliminate the CMRS spectrum cap, as required by Section 11 of the Communications Act, or, in the alternative, sunset the cap. At the very least, the Commission should modify the cap to increase the amount of spectrum available to wireless carriers. As Commissioner Powell states, "[i]t is indeed time to take a sober and realistic look at the CMRS ownership limitations in light of the current and foreseeable competitive environment in the wireless market."[11] BellSouth believes that such a sober and realistic analysis will demonstrate the need to immediately eliminate the cap.

Order, 11 F.C.C.R. 7824, 7869 (1996) (*CMRS Spectrum Cap Report and Order*), *appeal pending sub nom. Cincinnati Bell Tel Co. v. FCC*, No. 96-3756 (6th Cir), *recon.* 12 F.C.C.R. 14031 (1997), *aff'd sub nom. BellSouth Corp. v. FCC*, No. 97-1630, 1999 U.S. App. LEXIS 205 (D.C. Cir. Jan. 8, 1999).

9 *See CMRS Spectrum Cap Report and Order*, 11 F.C.C.R. at 7873 n.300.

10 *Notice* at ¶ 2 (citing *CMRS Third Report and Order*, 9 F.C.C.R. at 8104-05).

11 *Notice*, Separate Statement of Commissioner Powell at 1.

I. SECTION 11 COMPELS ELIMINATING OR MODIFYING A RULE NO LONGER IN THE PUBLIC INTEREST DUE TO "MEANINGFUL" COMPETITION

Section 11 of the Communications Act charges the Commission to review its regulations, including the CMRS spectrum cap set forth in Section 20.6 of the Commission's rules, on a biennial basis to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[12] If competition between providers renders the regulation no longer meaningful, then the Commission *must* repeal or modify that regulation.[13] Commissioner Powell summarizes the Commission's obligations under Section 11 *vis-à-vis* the CMRS spectrum cap as follows:

> In mandating that we review these ownership rules, Congress was primarily concerned that we adjust or eliminate these rules if, as is anticipated by the Telecommunications Act, sufficient robust competition develops. We have a duty to take a hard look at our ownership rules in light of the current state of competition and to ask and answer whether in light of significant changes in competitive conditions these rules are still valid.[14]

Section 11 leaves no room for ambiguity in determining what is in the public interest: Section 11(a)(2) directs the Commission to determine whether a regulation is no longer necessary in the public interest based upon the presence of "meaningful economic competition;"[15] if

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12 47 U.S.C. § 161(a)(2). The term "meaningful economic competition" is not defined in the statute or its legislative history. However, "meaningful" is synonymous with the term "significant." *See* American Heritage Dictionary 776 (2d ed. 1982). This indicates that while *full* competition is not required, *significant* competition is necessary to satisfy Section 11.

13 47 C.F.R. § 161(b); *see also* H.R. Conf. Rep. No. 104-458, at 185 (1996) ("Conference Report") (stating that "subsection (b) of section 11 requires the Commission to eliminate the regulations that it determines are no longer in the public interest" because "competition between providers renders the regulation no longer meaningful.").

14 *Notice*, Separate Statement of Commissioner Powell at 1.

15 *See* 47 U.S.C. § 161(a)(2).

meaningful economic competition is shown, then "absent extraordinary circumstances, it is incumbent upon this Commission to remove or modify" Section 20.6 of its rules.[16] BellSouth demonstrates below that, as contemplated by Section 11, the CMRS spectrum cap has outlived its usefulness and should be eliminated as the result of meaningful competition among CMRS providers and in the CMRS marketplace at large. To the extent residual concerns regarding competition remain, they can be addressed by other, less restrictive means.

BellSouth agrees with Commissioner Powell that the burden is on the Commission to show that the spectrum cap must be kept if the record reveals the presence of such meaningful economic competition:

> Frankly, I believe the burden should be on us, the FCC, to re-assess and re-validate the rule . . . . We cannot continue to sit back and struggle over getting rid of another ownership restriction because its opponents have failed to show why the rule is no longer "in the public interest."[17]

Nevertheless, BellSouth recognizes the concerns of Commissioner Tristani that "the rash of new entrants tapers dramatically as we look beyond our urban centers to our rural communities."[18] In response to such concerns, BellSouth shows herein that the current rule is no longer in the public interest, even in rural areas. Elimination of the rule will allow competing carriers to increase the quantity and quality of service offerings at ever-lower prices, in both urban and rural areas. Although there may never be as many service providers actually serving a rural community as an urban one, elimination of the spectrum cap will provide the competing rural service providers with

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16 *See Notice*, Separate Statement of Commissioner Powell at 2.

17 *See Notice*, Separate Statement of Commissioner Powell at 1.

18 *See Notice*, Separate Statement of Commissioner Tristani at 1.

the ability to provide better, cheaper service, and will incent other carriers (who may currently be prohibited by the cap) to offer service in such areas.

II. THE CMRS SPECTRUM CAP SHOULD BE ELIMINATED, OR AT LEAST SUBJECT TO SUNSET

A. The Development of "Meaningful" Competition Among CMRS Providers Has Satisfied the Spectrum Cap's Objective and Justifies Its Elimination Under Section 11

The cap should be eliminated because the development of meaningful competition and lower prices have satisfied the cap's purpose and justify its elimination under Section 11. The spectrum cap is simply an unnecessary vestige of a different era in wireless communications. Since the time the cap was first adopted in 1994 to ensure the development of a competitive CMRS marketplace and limit the ability of a single entity to artificially increase prices,[19] the wireless market has become substantially competitive, marked by "vigorous and ever increasing competition."[20] This conclusion is supported by the Commission's June 1998 *Third Annual CMRS Competition Report* submitted to Congress, which found that "the signs of competition are clear."[21]

According to the Commission's own statistics in the *Third Annual CMRS Competition Report*, there are three or more cellular, broadband PCS, and/or SMR providers competing to provide broadband service in markets covering 87 percent of the nation's population — in fact, markets spanning 68 percent of the U.S. population have four to six competitors in the broadband

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19 *See CMRS Third Report and Order*, 9 F.C.C.R. at 8104.

20 *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, GN Docket No. 96-228, *Report and Order*, 12 F.C.C.R. 10785, 10941-42 (1997) (*WCS Order*) (separate statement of Commissioner Chong).

21 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 13 F.C.C.R. 19746, 19749 (1998) (*Third Annual CMRS Competition Report*).

CMRS field.[22] Even in rural and high cost areas, there are at least two licensed cellular providers; cellular coverage alone is nearly ubiquitous, covering about 90 percent of the nation's territory and 98 percent of its population.[23] Providers of non-broadband services, such as paging, data, wireless e-mail, and other non-voice services, provide additional competition,[24] and there are now multiple satellite-based alternatives available as well. As a result of this increasing competitive entry, the Commission has found that the "most sought after benefit of competition in the mobile telephone market" has been achieved — namely, "prices have been falling."[25] Therefore, not only has meaningful competition arrived, but prices have fallen, thus fully satisfying the rule's purpose and justifying its elimination under Section 11.

B. Eliminating the 45 MHz Cap Will Serve the Public Interest, Even in Rural Areas

1. Eliminating the Cap Will Allow Carriers to Better Compete with LECs and Narrowband Providers, Offer New Advanced Technologies and Services, and Use Spectrum More Efficiently, Resulting in Greater Overall Telecommunications Competition

By eliminating the 45 MHz cap on broadband CMRS services, carriers will be able to take full advantage of technical innovations and consumer demand without being subject to arbitrary regulatory constraints. As a result, carriers will be better able, and will have the incentive, to compete with local exchange carriers ("LECs"), compete with narrowband-type services, develop and deploy new advanced technologies and services, and use spectrum more efficiently, as discussed below.

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22 *Third Annual CMRS Competition Report,* 13 F.C.C.R. at 19752, 19768.

23 *See Notice* at ¶ 45.

24 *Notice* at ¶ 30.

25 *Third Annual CMRS Competition Report,* 13 F.C.C.R. at 19769.

First, eliminating the spectrum cap will allow CMRS providers to better compete with LECs. As more CMRS companies contemplate the use of wireless spectrum to offer local exchange services, the existing spectrum limit constitutes a significant constraint on these firms' abilities to offer wireless local loop or high-speed mobile data services, either on a stand-alone basis or bundled with mobile voice services. To offer these new services, while simultaneously ensuring that existing subscriber needs and expectations are met, broadband CMRS providers must be able to acquire and use additional spectrum, without concern for whether some arbitrary spectrum cap will be exceeded. As long as the cap remains in place, carriers will clearly give first priority to serving the needs and expectations of the customers for their existing service offerings as they acquire new spectrum up to 45 MHz. As they become constrained by the spectrum limit, they are precluded from fully realizing their potential as true competitors to existing wireline local networks, because carriers are unlikely to degrade service to their mobile voice customers in order to provide alternative services, such as wireless local loop. Chairman Kennard has previously stated:

> [The *Third Annual CMRS Competition Report*] suggests that some wireless providers are gearing up to compete against wireline providers. *We should explore every available opportunity to promote that competition.*[26]

Removal of the 45 MHz spectrum cap in this proceeding will advance this goal by removing a major constraint on carriers' expansion into new services, thus allowing wireless carriers to better compete in local telephone service markets.

Second, elimination of the 45 MHz limit on the aggregation of broadband CMRS spectrum will allow broadband providers to increase their non-voice offerings, including paging and mobile-data, to better compete with narrowband CMRS providers that are not subject to the cap. For

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26 *Third Annual CMRS Competition Report*, 13 F.C.C.R. at 19819 (emphasis added) (separate statement of Chairman Kennard).

example, existing broadband networks are generally configured to make optimal use of broadband spectrum allocations to provide mobile voice service, out of necessity. Most of the available spectrum used by broadband providers must be dedicated to ensuring that their primary voice systems operate efficiently to meet the needs of their voice subscribers. Some broadband CMRS carriers are providing collateral narrowband-like service offerings including paging and mobile data over their spectrum, and some have even dedicated spectrum to such services, as BellSouth Wireless Data has done for its interactive two-way paging service. Nevertheless, such collateral services cannot reach their full potential as competitors to narrowband services if the 45 MHz cap is maintained, because these services, when offered over broadband spectrum, count against the spectrum cap, and thereby reduce the amount of spectrum available for broadband voice services.

For example, BellSouth uses SMR spectrum to provide a highly innovative two-way paging service that includes e-mail, voice mail, and a host of other services, using the Research In Motion ("RIM") Inter@ctive Pager 950. As a result of an agreement with Fidelity Investments, customers using the RIM 950 will be able to receive real-time stock prices, transaction confirmations, and other information. They will be able to get quotes by entering ticker symbols and will be able to make trades.[27] The spectrum cap limits BellSouth's ability to provide this kind of cutting-edge service, however, because spectrum dedicated to this service is deducted from the amount of spectrum BellSouth can use to provide cellular and PCS phone service. As the Commission recognizes, "to the extent that incumbent licensees build networks coupled with CMRS spectrum that are targeted mainly to mobile voice users, opportunities for entry and development of competition in other services may be limited in the short to medium term."[28] Elimination of the spectrum cap will allow

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[27] *See Fidelity Investments to Offer Stock Trading Option on RIM Inter@ctive Pager 950*, Land Mobile Radio News, Jan. 8, 1999, at 1.

[28] *Notice* at ¶ 47.

broadband CMRS providers to acquire the spectrum they need to better compete in providing such narrowband-type services while continuing to meet the needs of their voice subscribers.

Third, the CMRS spectrum cap acts as an impediment to the development and introduction of new advanced services and technologies, including new third generation/IMT-2000 services, which will require access to large amounts of additional spectrum.[29] For example, the most recent global spectrum requirement for terrestrial third generation and existing services is estimated to be 390 MHz — 200 MHz of which is for new third generation services.[30] In this environment, where the amount of available spectrum will increase substantially, concerns regarding spectrum concentration in the CMRS marketplace are significantly diminished.[31] Thus, continuing the 45 MHz spectrum cap makes no sense. For existing carriers, the 45 MHz cap would effectively foreclose them from having access to the substantial amounts of new spectrum needed to offer new third generation services, including multimedia, Internet access, imaging, and video conferencing. For new entrants, the spectrum cap also places an arbitrary 45 MHz limit on the amount of spectrum available to them, and would likewise prevent them from offering a full range of services. Indeed,

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29 *See, e.g*, Third Generation Comments of AT&T Wireless Communications at 7, Bell Atlantic Mobile at 5-7, BellSouth at 16-19, and CTIA at 3 (favoring elimination of the spectrum cap) in response to Public Notice, "Commission Staff Seek Comment on Spectrum Issues Related To Third Generation Wireless/IMT-2000," DA-98-1703 (rel. Aug. 26, 1998); *see also* Third Generation Comments of AirTouch Communications at 15, Bell Mobility at 3, Motorola at 21, Personal Communications Industry Association at 12-13, SBC Wireless at 6-7, Telecommunications Industry Association at 14-15, and the Universal Wireless Communications Consortium at 5 (arguing that the existing spectrum cap would inhibit existing PCS licensees from using higher data rates that would be needed for providing third generation services).

30 *See* U.S. TG 8/1 IMT-SPEC Ad Hoc, U.S. Revision to IMT-SPEC Attachment to 15th TG8/1 Meeting Report: Working Document Towards a Draft New [Recommendation or Report] ITU-R M.[IMT-SPEC]; SPECTRUM REQUIREMENTS FOR IMT-2000 at 5, 10 (Jan. 22, 1999). In the United States, 190 MHz is currently allocated to existing paging, cellular, PCS and enhanced SMR services. *Id.* at 10.

31 *See CMRS Spectrum Cap Report and Order*, 11 F.C.C.R. at 7873 n.300.

it may not even be *possible* to provide the more spectrum-intensive services, such as multimedia and Phase II services, to multiple subscribers on a commercial basis within 45 MHz of spectrum, and a carrier managing to provide such services even to a handful of subscribers would clearly not have any capacity available to provide other, narrower-bandwidth services, such as voice, messaging, and switched data.[32] Eliminating the cap removes all of these impediments, allowing subscribers to reap the benefits of obtaining these advanced new services and technologies from their service providers.

Finally, elimination of the cap will help to increase the efficient use of spectrum, especially by current licensees who are in best position to invest in new technologies and services and make the most efficient use of additional spectrum, leading to a more robust assortment of service offerings. Existing carriers uniquely possess the technical and financial wherewithal to develop advanced services.[33] In the absence of a cap, they would also be able to leverage their economies of scope to lower prices to consumers.[34] Eliminating the cap would allow these carriers to take make the most efficient, and cost-effective, use of spectrum.

2. Based on The Unique Realities of the Rural CMRS Marketplace, Rural Areas Will See the Benefits of Lower Prices and Expanded Service Offerings Sooner If the Spectrum Cap Is Removed

BellSouth recognizes the Commission's concern that in some rural areas throughout the country, broadband wireless service is limited to that provided by two competing cellular carriers, and that broadband PCS and/or SMR providers may have yet to introduce service.[35] This concern,

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32 *See* Third Generation Comments of BellSouth at 16-17.

33 *See, e.g.,* Third Generation Comments of Telecommunications Industry Association at 15.

34 *See* Third Generation Comments of Telecommunications Industry Association at 15.

35 *See Notice* at ¶ 45.

however, appears to presuppose that the public interest will only be served by the presence of a vast number of service providers in rural areas, as has recently been the case in metropolitan areas. In fact, just the contrary is true. The public interest will be served by eliminating the spectrum cap, even in rural areas where there are currently only two competitors, based upon the vastly different market realities in those areas.

The spectrum cap was designed to ensure that a variety of competitors had access to spectrum, and that it was not aggregated by a few carriers who would hoard the spectrum and raise or artificially control prices.[36] The spectrum cap does not work well in a rural environment, however, where there are simply not enough customers to justify the huge investments in multiple redundant wireless networks as there are in urban areas where the market for multiple competitors is more lucrative.[37] Thus, the high cost/low-margin characteristics of rural areas necessarily mean they are unlikely to be the immediate targets of new entrants or competitors. In the case of rural areas, then, the spectrum cap is ineffectual at encouraging greater competitive entry when simple economics preclude it. As the Commission notes, "the economics of offering service to these lower density populations may nevertheless limit the extent of competitive, facilities-based entry."[38]

Instead of arbitrarily trying to ensure the presence of more than two competitors in rural areas, the Commission should focus on ensuring that spectrum in rural areas is put to its highest and

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36 *See CMRS Third Report and Order*, 9 F.C.C.R. at 8104.

37 *See, e.g.*, Peter Key, *Triton Buys Alabama Firm*, Philadelphia Business Journal, Oct. 2, 1998, at 3 (noting that additional competitors beyond the two established cellular providers in rural areas are unlikely because of the expense of bringing digital wireless service to those areas); Martin J. Moylan, *Alexandria, Minn., Firm Finds Niche in Rural Wireless Market*, St. Paul Pioneer Press, Sept. 14, 1998 (noting the high expense of establishing wireless networks in rural areas, particularly given their low population densities).

38 *Notice* at ¶ 46.

best possible use in a manner that promotes the public interest of rural Americans. The D.C. Circuit recently accepted the Commission's argument that it would consider granting a waiver of the spectrum cap if a market was not adequately served by providers, thereby permitting an existing carrier to accumulate spectrum above the cap if it seemed no other competitor would enter the market.[39] The Commission argued that the aggregation of spectrum in such a case would promote the public interest by preventing the spectrum from lying fallow.[40] Eliminating the spectrum cap will incent those carriers with sufficient resources to build out rural systems to enter these markets, resulting in more consumer choices and lower prices. Moreover, the purpose of the rule would not be undermined, according to the Commission, because it would not give any of the existing carriers that were already in the market the ability to exclude other carriers — since there were none — by aggregating spectrum.[41]

Rather than relying upon an expensive and time-consuming waiver mechanism, as the Commission was suggesting in its example before the D.C. Circuit, the Commission should simply eliminate the spectrum cap and allow the public in rural areas to begin to reap the benefits of efficiently-used spectrum, even if it is only by a few carriers. By allowing incumbent providers to take advantage of economies of scope, they will be able to provide lower-cost service to subscribers.[42] Allowing incumbents to aggregate additional spectrum will also allow them to provide to the public more advanced services and technical options that require greater spectrum capacity. Eliminating the spectrum cap will thus promote the public interest by allowing rural

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39 *See BellSouth Corp. v. FCC*, No. 97-1630, 1999 U.S. App. LEXIS 205, *208 (D.C. Cir. Jan. 8, 1999); *id.*, Transcript of Proceedings at 18-19 ("Transcript").

40 *See id.*

41 *See* Transcript of Proceedings at 19.

42 *See Notice* at ¶ 46.

customers to have reliable access to the greatest number of services and technologies at competitive rates. Indeed, with access to sufficient spectrum, rural operators may find it economically possible to provide services that are otherwise difficult or too costly to provide in rural areas, even by wireline facilities, such as high-speed, low-cost Internet access.

Spectrum should be made available for economically and socially productive use, especially in rural areas, where the cost of the wireline plant is highest. Any spectrum cap prevents a company from acquiring spectrum that it might otherwise put to use to provide services of value to rural subscribers. It does not serve the public interest to hold needed spectrum in reserve for a future potential competitor in a market few have chosen to enter. Likewise, it does not serve the public interest to prevent a willing seller from transferring spectrum to a willing buyer who values it more highly, even though the buyer would hold over 45 MHz.[43]

C. Other Less Intrusive Means Exist to Guard Against Concerns of Anticompetitive Spectrum Aggregation, Including the Competitive Market

Existing antitrust laws, transfer and assignment review polices, and complaint procedures are available to police against anticompetitive conduct, should it occur.[44] Since existing antitrust rules are sufficient to guard against anti-competitive spectrum aggregation, the spectrum cap is superfluous. Moreover, concerns regarding excess concentration of spectrum can be evaluated by

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[43] It is noteworthy that the spectrum cap does not prevent some companies from acquiring in excess of 45 MHz of spectrum in many rural areas, even today. Because SMR and cellular spectrum is non-attributable if the SMR or cellular coverage overlaps less than 10 percent of the population in the carrier's PCS license area, a carrier could have up to 45 MHz of PCS spectrum, 25 MHz of cellular spectrum, and 10 MHz of SMR spectrum — 80 MHz in all — in the less-populated parts of an MTA, for example. *See* 47 C.F.R. § 20.6(c). By eliminating the cap, the Commission would give carriers greater flexibility in matching spectrum to consumer service needs and eliminating this anomaly in the rules.

[44] *See, e.g.*, 15 U.S.C. § 18; 47 U.S.C. §§ 308(b), 310(d).

the Commission on a case-by-case basis during the application review process, as CMRS operators acquire new spectrum either at auction or in mergers. In the case of spectrum acquired by auction, the Commission can review the application for license submitted by the applicant, and mergers and acquisitions can be reviewed when assignment or transfer applications are filed.

Recognizing the Commission's resources are limited,[45] the Commission could adopt a processing threshold instead of a spectrum cap. This would require applicants to identify in their application if they will exceed some specified number of MHz, in which case they must demonstrate that the proposal serves the public interest. Applications involving less than the specified number of MHz would continue to be processed as normal. The level at which any such threshold is pegged should not be a permanently fixed number of MHz, however, but should automatically adjust to the total amount of spectrum available for competing services and should take into account future spectrum needs. Thus, for example, the threshold should automatically be raised as spectrum is allocated for third generation mobile service or rules are amended to allow mobile use of broadcast frequencies. This case-by-case method of reviewing possible anticompetitive results when a serious issue is presented is highly preferable to a spectrum cap that prevents successful, service-oriented companies from responding to customer demands for new and improved services, yet takes the Commission's limited resources into account. Moreover, the establishment of a threshold would continue to provide parties considering an acquisition with bright-line assurance that the transaction is permissible.[46] Such regulatory certainty is critical in incenting industry investment in new wireless services.

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45 *See Notice* at ¶ 75.

46 *See CMRS Third Report and Order*, 9 F.C.C.R. at 8104-05.

In addition to these existing disciplinary checks on anticompetitive conduct, which involve minimal regulatory intervention, the competitive marketplace also serves to police against anticompetitive conduct. As the Commission suggests, dis-economies of scale may limit the amount of spectrum which firms will seek to aggregate, thus tending to ensure a competitive CMRS sector in the absence of a spectrum cap.[47] Moreover, capital markets may not finance attempts by individual firms to acquire anticompetitive amounts of spectrum.[48]

In any event, the time has come to rely upon the competitive CMRS market, given the lack of an "identifiable market failure."[49] BellSouth thus agrees with the Commission that it should "trust[] in the operation of market forces," which "generally better serves the public interest better than regulation."[50]

D. At a Minimum, the Cap Should Be Sunset

As shown above, the presence of meaningful economic competition between and among CMRS providers and in the CMRS marketplace as a whole justifies the immediate removal of the spectrum cap. Any lingering concerns can be addressed by competitive market forces, as well as the Commission's ability to review applications. Existing antitrust laws are also a powerful deterrent to anticompetitive concerns. If, however, the Commission is not ready to rely solely upon those forces, despite the showing above that the public interest will be served by doing so, the solution is to sunset the spectrum cap. As Commissioner Powell notes, "one thing is clear to me.

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47 *See Notice* at ¶ 38.

48 *See Notice* at ¶ 38.

49 *See Notice* at ¶ 5.

50 *See Notice* at ¶ 5.

This cap should not last forever. . . . But, I am more intrigued by and interested in *at least* establishing a firm sunset date for this prophylactic ownership restriction."[51]

At the outset, BellSouth believes that a two-year sunset is most consistent with the biennial review process established by Section 11. As Commissioner Furchtgott-Roth has noted, Section 11(a) requires the FCC to "'review *all* regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service.'"[52] Given that a rule that is not repealed outright must be reviewed again in two years, there would appear to be no need for a longer sunset period.

Alternatively, the Commission could set the sunset date at five years from the Commission's issuance of D, E, and F Block broadband PCS licenses.[53] Such a sunset date would coincide with the Commission's initial five-year build-out requirements for these licensees,[54] thus allowing a reasonable period of time for any additional new entrants to finish building out their systems and to launch service. To the extent additional carriers have not launched service by the sunset date, it is likely economic forces are precluding them from doing so. Thus, for the reasons set forth above, the spectrum cap would no longer have a viable purpose and should simply be eliminated to allow incumbents to acquire the spectrum otherwise lying fallow. Moreover, this proposal would coincide

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51 *See Notice*, Separate Statement of Commissioner Powell at 2 (emphasis added).

52 *See Notice*, Separate Statement of Commissioner Furchtgott-Roth at 1 (quoting 47 U.S.C. § 161(a)(1)).

53 The Commission granted the D, E, and F Block broadband PCS licenses on April 28, 1997. *See Public Notice*, "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," DA 97-833 (Apr. 28, 1997). This would result in a sunset date of April 28, 2002 for rural markets with only two cellular providers.

54 *See* 47 C.F.R. § 24.203(b).

well with the expected auctioning of new spectrum for third generation and other services, which incumbents may seek to acquire and may otherwise be precluded from obtaining.

III. GIVEN THE OPTION TO ELIMINATE THE CAP, TEMPORARY FORBEARANCE FROM ENFORCEMENT IS A POORLY-TAILORED REMEDY

The Commission has suggested that forbearance under Section 10 of the Communications Act, 47 U.S.C. § 160, is another option for addressing spectrum aggregation concerns in CMRS.[55] Under forbearance, however, the spectrum cap would remain on the books as a codified rule, but the Commission would refrain from enforcing it.[56] This proposal is an ill-suited remedy to solving the problems created by the spectrum cap — namely insufficient access to spectrum and the need for certainty in deciding to invest in new technologies and services. If the rule is not warranted, the Commission should eliminate it outright rather than temporarily forbearing from enforcement. It makes little sense to leave it on the books if the Commission finds that the public interest warrants not enforcing it at all.

First, forbearance does not address the fact that additional subscribers are creating a steadily-increasing need for access to spectrum created by additional subscribers and the demand for new services is not temporary. According to the Commission's *Third Annual CMRS Competition Report*, there have been sharp increases in subscribers in the period between 1996 and 1997. For example, by the end of 1997, the broadband CMRS industry (cellular, broadband PCS and SMR) showed a 22 percent increase in subscribers from 1996, which was a nearly threefold increase since 1993.[57] The Commission expects the mobile telephony market's penetration rate to grow some 14.7 percent over the five next years from 20 to 41 percent by the end of 2002, translating into an increase in

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55 *Notice* at ¶ 63.

56 *See Notice* at ¶ 63.

57 *Third Annual CMRS Competition Report*, 13 F.C.C.R. at 19749-51.

subscribers from 55 to 114 million.[58] In addition to these new highs in subscribership, consumers are increasingly savvy and are demanding access to the latest technologies and services.[59] Given the ever-increasing projected number of subscribers, and their demand for advanced services and technologies, it is beyond doubt that CMRS spectrum needs will continue to grow and are not temporary. Forbearance from enforcing the cap should not be temporary either, and the therefore rule should simply be eliminated.

Moreover, carriers need regulatory certainty in deciding to invest in new technologies and services, not selective enforcement of dormant rules. Development and deployment of new third generation services, for example, will require a substantial investment of resources, both time and financial. Carriers will not have the incentive and certainty they need to make these investments under the cloud of a dormant spectrum cap rule that is still on the books. If the criteria for forbearance have been met, the Commission needs to do more than just forbear — it needs to eliminate Section 20.6 altogether.

IV. IF THE CAP IS NOT ELIMINATED, THEN THE COMMISSION MUST INCREASE THE AMOUNT OF SPECTRUM THAT CAN BE AGGREGATED UNDER THE CAP

A. To Meet Carriers' Increasing Spectrum Requirements, the Cap Must be Increased if Not Eliminated

As has been clearly shown above, the CMRS industry has a growing need for more spectrum in order to offer consumers the broadest array of wireless services while maintaining sufficient capacity to address rapidly increasing subscribership levels. Third generation wireless is but one example of how carriers will require more spectrum in the near future. BellSouth demonstrated in the third generation proceeding that not only will existing carriers require more spectrum to offer

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[58] *Third Annual CMRS Competition Report*, 13 F.C.C.R. at 19751, 19778.

[59] *See, e.g., Third Annual CMRS Competition Report*, 13 F.C.C.R. at 19771-72.

third generation services, new entrants may also not be able to provide all of the contemplated advanced offerings even with 45 MHz of spectrum.[60] The convergence of voice and data service offerings cited to recently by both the D.C. Circuit and the Commission, as demanded by consumers,[61] will also fuel carriers' needs for increased spectrum capacity to provide these various services. For example, BellSouth and 3Com have recently begun marketing the "Palm VII" device, which is a hand organizer that will enable users to secure access to the Internet and provide a means of instant two-way communication over BellSouth Wireless Data's Nationwide Intelligent Wireless Network. In order to continue to provide these and other service enhancements, the Commission must increase the cap if it is not eliminated.

There is, however, no way of knowing how much spectrum carriers will need as the wireless industry evolves. Thus, adjusting the cap, while a better alternative than keeping the 45 MHz cap in place, would only be a temporary solution. The development of new wireless services will result in a continual process of raising the cap. Any increase in the level of the spectrum cap would also be difficult to implement because of the overlapping nature of CMRS market areas (*e.g.*, MSAs v. MTAs, RSAs v. BTAs), which would require carriers to assess anew in every area they provide service how much spectrum they can acquire in a given area under any revised spectrum cap proposal. A processing threshold, as discussed in Section II.C, *supra*, presents some of the same difficulties, but does not have the same preclusive effects.

In either case, the establishment of a fixed number of MHz is decidedly inferior to a threshold that adjusts upward automatically to account for additional spectrum converging with broadband CMRS. As more and more services converge, the total pool of potentially competitive

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60 *See supra* Section II.B.1; *see also* BellSouth Third Generation Comments at 16-17.

61 *See BellSouth Corp. v. FCC*, No. 97-1630, 1999 U.S. App. LEXIS 205 (D.C. Cir. Jan. 8, 1999); *Third Annual CMRS Competition Report*, 13 F.C.C.R. at 19753-54.

spectrum increases, and so should any cap or threshold. In any event, the Commission should avoid such temporary solutions and their attendant implementation difficulties by simply eliminating the cap.

B. Any Alteration of the Attribution Rules Would Necessarily Be Arbitrary and Ill-Suited to Addressing Carriers' Increasing Spectrum Needs

The Commission has also suggested as an option relaxing the attribution criteria. Currently, equity ownership of 20 percent or more is generally attributable for purposes of the spectrum cap.[62] The Commission's proposal in this regard is not viable because it does not directly address carriers' increased spectrum needs. It focuses only on what percent of ownership an entity can have in multiple licensees in a given area, rather than on how much spectrum carriers need to provide the services customers demand. It is, in other words, comparing two disparate concepts. In addition, any revisitation of the attribution rules would be arbitrary, as there is no logical way to set new attribution rules and it is difficult to ascertain how new needs can be accommodated. Accordingly, the Commission's proposal to modify the attribution rules should also be rejected as an inappropriate remedy.

CONCLUSION

Given the meaningful economic competition that exists within the CMRS industry and among CMRS providers, the 45 MHz CMRS spectrum cap in Section 20.6 of the Commission's rules should be removed as prescribed by Section 11 of the Communications Act. Eliminating the spectrum cap will serve the public interest, even in rural areas. Given the competitive nature of the market, it is time for the Commission to rely upon the operation of market forces to police the market, rather than to selectively forebear and leave unnecessary regulatory impediments on the

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[62] *See* 47 C.F.R. § 20.6(d).

books.[63] Eliminating the spectrum cap will ensure that the Commission promotes, rather than impedes, the introduction of innovative services and technological advances.[64] In the alternative, BellSouth urges the Commission to sunset the cap. At the very least, the Commission must modify the spectrum cap to allow carriers to access sufficient spectrum to meet the growing needs of their subscribers and to develop and deploy new advanced services.

Based upon the foregoing, the Commission should adopt the rules and policies set forth herein.

Respectfully submitted,

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63 *See Notice* at ¶ 5.

64 *See Notice* at ¶ 5.